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In the Supreme Court of the United States

OCTOBER TERM, 1941

BENJAMIN M. PERLSTEIN AND HARRY PAUL,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Argument	8
Conclusion	12

CITATIONS

Cases:

Bryant v. *United States*, 257 Fed. 378	10
Fulbright v. *United States*, 91 F. (2d) 210	11
Heike v. *United States*, 227 U. S. 131	10
Odom v. *United States*, 116 F. (2d) 996	11
Pettibone v. *United States*, 148 U. S. 197	11
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150	10

Statutes:

Criminal Code:

Sec. 37 (U. S. C. 1940 ed., Title 18, Sec. 88)	2
Sec. 135 (U. S. C. 1940 ed., Title 18, Sec. 241)	3

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals upon the first appeal is reported in 120 F. (2d) 276. The opinion of the District Court on motion in arrest of judgment (R. 355–369)[1] at the second trial is reported at 39 F. Supp. 965. The opinions in the Circuit Court of Appeals upon this appeal (R. 390–423, 431–432) are not yet reported.

[1] The printed record herein consists of the Appendix to petitioners' brief in the court below.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 20, 1942 (R. 424), and a petition for rehearing was denied on March 16, 1942 (R. 432). The petition for a writ of certiorari was filed March 27, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court.

QUESTION PRESENTED

The question presented is whether the petitioners were (R. 396) "properly convicted on a count charging them with conspiracy to obstruct the administration of justice in violation of Section 135 of the Criminal Code when the conspiracy was entered into at a time when there was no proceeding pending in the District Court of New Jersey, though continued into a period when there were proceedings pending in that court, and acts in furtherance of the conspiracy were committed both prior to and after the commencement of the proceedings referred to."

STATUTES INVOLVED

Criminal Code:

> SEC. 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United

States in any many manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both (U. S. C., 1940 ed., Title 18, Sec. 88).

SEC. 135. Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both (U. S. C., 1940 ed., Title 18, Sec. 241).

STATEMENT

The petitioners, botl. attorneys-at-law, together with two other defendants, were indicted in the United States District Court for the District of New Jersey, in an indictment containing two

counts. Only the first count was in issue in the instant proceeding [2] (R. 328). This count charged the petitioners with conspiring together and with Herbert R. Short and Michael Aluise corruptly to obstruct and impede the due administration of justice in the District Court for the District of New Jersey continuously during the period from October 15, 1937, to the date of the filing of the indictment, April 16, 1940 (R. 1, 13).

In brief, the count alleged that from November 1, 1939, investigators of the Alcohol Tax Unit of the Bureau of Internal Revenue were conducting an investigation to determine whether Short and Aluise had violated the internal revenue laws relating to liquor, in connection with a still set up in the Garbage Disposal Plant in Atlantic City in 1937. It further alleged that in the course of the investigation the special investigators questioned John A. Graham, Edward S. Graham, Henry S. Speed, and others in order that they should be witnesses for the United States before the United States Commissioners, the grand jury and the District Court. It also alleged that the December

[2] The second count charged the same defendants with conspiring to violate the liquor tax laws. The entire indictment was in issue on a previous trial. At that time the trial judge directed a verdict for Paul on the second count and Perlstein was acquitted on the second count. Short and Aluise were convicted on both counts and Perlstein and Paul on the first count. The Circuit Court of Appeals reversed the conviction as to Perlstein and Paul. 120 F. (2d) 276.

Term, 1939, grand jury was inquiring as to the same violations, that on January 17, 1940, a complaint was lodged with a United States Commissioner charging Short with liquor tax violations in relation to the still, and that on February 14, 1940, Short was arraigned before a United States Commissioner on a complaint charging conspiracy to commit the same liquor tax violations. The count concluded that, as a part of the conspiracy, the defendants, knowing and expecting that John A. and Edward S. Graham and Speed were to be called as witnesses before the Commissioners, the District Court and the grand jury with respect to the matter under inquiry, endeavored to influence these witnessses by promises and offers of inducement and advised the witnesses to testify falsely before the grand jury and not to identify Short and Aluise as the persons having possession and control of the still in question, and that thereby the defendants obstructed and impeded the due administration of justice in the District Court (R. 13–18).

The count set forth seven overt acts, at specified times and places, all being conversations between two or more of the defendants or between one or more of the defendants and the witnesses previously named. Five of the overt acts were alleged as of times subsequent to the institution of proceedings before the grand jury and the United States Commissioners. Two of the overt acts were stated to be prior to that time (R. 18–19).

The case was tried before Judge Maris sitting as District Judge. The essential facts forming the background for the charge were largely uncontested. It was shown that in October 1937 state liquor enforcement officers investigating state and federal liquor tax violations had seized an unlicensed still at the Atlantic City Garbage Disposal Plant. Shortly thereafter they arrested John Graham, the tenant of the plant (R. 38–39). Perlstein appeared as Graham's attorney and later entered a plea of guilty on Graham's behalf to state charges of liquor violations in connection with the still (R. 49–53, 55–56, 252–267). Graham had no financial interest in the still (R. 298). Short and Aluise were the owners and operators (R. 121–122, 144–145, 163–164, 296).

The petitioners formally conceded that the investigations by the Alcohol Tax Unit and the grand jury and the proceedings before the United States Commissioners, in 1939 and 1940, took place as alleged in the indictment (R. 44–46). During the course of the investigations Paul acted as attorney for Aluise and for Graham (R. 189–193).

There was direct testimony that in 1937 Perlstein advised Graham to say nothing about the still and that during the federal investigation Paul advised John Graham, Edward S. Graham and Henry S. Speed, all of whom had knowledge of the ownership of the still, not to identify Short and Aluise as the owners to the federal investiga-

tors or the grand jury (R. 51–52, 63, 64–66, 69, 134–138, 146–149, 175–176). Perlstein's participation in the later stages of the conspiracy was shown (R. 64–66, 134–138). The evidence clearly supported the conclusion that a conspiracy existed and that the petitioners, while purporting to act as attorneys for Graham or Aluise, as a part of the conspiracy endeavored to prevent and impede the federal investigation of the violations arising out of the operation of the still and to protect Short and Aluise from state and federal prosecution (R. 50–53, 62–63, 64–67, 68–69, 122–123, 133–138, 144–149, 165–168, 174–176, 295–302).

After the rendition of the verdict the petitioners moved in arrest of judgment on the ground that they could not be convicted under the first count of the indictment for the reason that it charged them with a conspiracy to obstruct the administration of justice prior to the institution of any federal proceedings (R. 354). They previously had attempted to raise the point by motion to quash the indictment (R. 23–30). The motions were denied by the trial court (R. 30, 370).

Both petitioners were convicted and received sentences of one year and one day imprisonment (R. 383–386).

The Circuit Court of Appeals, sitting *en banc*, affirmed the convictions (R. 390–424). Two judges dissented. In so affirming the court held that the indictment in fact and in law charged the ex-

istence of a conspiracy after the inception of federal proceedings, that the proof sustained the judgment, and that the defendants were not injured by the allegations or proof of facts prior to that time (R. 407–408).

ARGUMENT

1. This case does not present the question which petitioners seek to raise, namely, whether they may be convicted of conspiring to influence a prospective witness at a time when there is not yet pending any proceeding before a court, grand jury, or United States commissioner. The plain fact is that petitioners were charged with a continuing conspiracy which, although commenced prior to the impanelling of the grand jury and prior to the hearing before the commissioner, nevertheless continued to operate during those proceedings.

Moreover, the jury's verdict demonstrates that petitioners were convicted with respect to the conspiracy that functioned during the proceedings. This is made clear by the following. The indictment named four conspirators: Short, Aluise, Perlstein, and Paul. However, the original conspiracy involved only three of those defendants; the fourth, Paul, joined the conspiracy *after* the proceedings had been commenced.[3] Accordingly,

[3] The proceeding before the United States commissioner began on January 17, 1940 (R. 46), and the Grand Jury pro-

the verdict as to Paul is conclusive that the defendants were convicted with respect to a conspiracy that lived during the proceedings in question.

Indeed, the court below expressly refused to pass upon the hypothetical question raised by petitioners (R. 401). Rather, it held that assuming the conspiracy could not have constituted an offense prior to the inception of proceedings, the indictment nevertheless charged the existence of a conspiracy after proceedings were begun and that the proof sustained the judgment (R. 407–408). The allegations of the indictment relating to the prior period may therefore be disregarded as surplusage.

This decision was clearly correct. The indictment charged a conspiracy which continued after the institution of proceedings and alleged the facts of the pendency of the proceedings, the knowledge and intent of the defendants with respect to the proceedings, the obstruction of those proceedings as a part of the conspiracy and five overt acts performed after proceedings were instituted (R. 13–19). And evidence of acts prior to the proceedings herein, even under a limitation of the conspiracy to a subsequent time, was nevertheless

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ceedings commenced during the December 1939 term of the District Court for the District of New Jersey, specifically on or before January 11, 1940 (R. 15). But the first time that Paul had any contact with the other three defendants was "late in January of 1940" (R. 189).

admissible. *Heike* v. *United States,* 227 U. S. 131.

Moreover, even if the indictment be read without excising the allegations relating to the prior period, there was charged and proved a Federal offense, since the conspiracy continued after institution of the federal proceedings. See R. 400–401. A continuing agreement, however innocent in its inception, which remains in existence and is acted upon after it is made criminal by some subsequent event, constitutes an indictable conspiracy. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 227; *Bryant* v. *United States,* 257 Fed. 378 (C. C. A. 5th).

2. But even if this case did present the question posed by petitioners, the decision below would nevertheless be correct and there would still be no basis for certiorari. Section 37 of the Criminal Code makes it a crime to conspire to commit any offense against the United States, and Section 135 prohibits any attempt to influence a witness in a Federal court, grand jury, or before a United States commissioner. In essence, the petitioners herein were charged with having conspired to violate Section 135.

It is of course true that the conspiracy must be directed at a proceeding before a court, grand jury, or commissioner. But it is not required that the proceeding shall have already commenced. For example, in anticipation of a grand

jury to be impanelled on the following day several persons may conspire immediately to prevent witnesses from appearing. Plainly, such a conspiracy would be aimed directly at a proceeding covered by Section 135, and it would not be material that the proceeding has not yet been initiated.

In this view, there would be no conflict whatever with the dicta relied upon by petitioners in *Pettibone* v. *United States,* 148 U. S. 197; *Odom* v. *United States,* 116 F. (2d) 996 (C. C. A. 5th); *Fulbright* v. *United States,* 91 F. (2d) 210 (C. C. A. 8th).[4] To the extent that petitioners may extract any rule from those decisions, it is merely that the conspiracy must be directed at a judicial proceeding. In those cases, the acts of the defendants might have been performed wholly without reference to any judicial proceeding and it was, therefore, relevant to inquire whether they knew of the pendency of such proceedings. But in the instant case the conspiracy was aimed directly at judicial proceedings which were anticipated by the defendants.

Accordingly, even if the pre-1940 conspiracy may be isolated, the decision below would still be correct and consistent with the decisions relied upon by petitioners.

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[4] The *Odom* case was reversed on a confession of error by the United States on a related issue, 313 U. S. 544. The *Fulbright* case involved a different and more limited statute.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. It is therefore, respectfully submitted that the petition should be denied.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
ARNOLD RAUM,
ELLIS N. SLACK,
ROBERT R. BARRETT,
Special Assistants to the Attorney General.

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